PRODUCT LIABILITY IN CHINA, USA AND EUROPE. A COMPARATIVE STUDY

Tesi di laurea in LAW AND BUSINESS IN CHINA

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Introduction

Over the past thirty years, the People’s Republic of China has experienced an impressive economic growth, and has gradually opened up to the global market. After protracted and complex negotiations, China has also officially joined the World Trade Organization (‘WTO’) in December 2001. The global circulation of Chinese products has however been accompanied by concerns over their safety and quality.¹ As a result, the Chinese government has been under great international pressure to strengthen its regulation of product liability. Furthermore, several high-profile cases, such as the Sanlu tainted milk scandal (2008), have made product liability concerns all the more pressing in recent years. Notably, the media have played a key role in denouncing product failures, while Chinese consumers have been ever more aware of their legal rights and willing to pursue their claims to court.² In response to international and domestic pressures, therefore, China has rapidly developed a product liability system similar in many respects to the European regime, which was largely completed with the promulgation of the Tort Liability Law in 2009.³

To-date, however, the Chinese product liability system remains to a large extent a dead letter. A comparative study with the American and the European models, thus, gives the opportunity not only to observe the main influences on the Chinese product liability system, but also to explore how product liability may evolve in China over the coming years.

The purpose of this thesis is accordingly to show how the American and European models have influenced, and may influence, the evolution of product liability in China. To this purpose, the USA and European product liability regimes will be examined and compared with the current Chinese product liability system, taking due account of the different legal contexts. In addition, the application of product liability rules in the special context of medical products will be discussed through some case studies.

Chapter One begins by tracing the evolution of product liability law in China from the opening-up period to nowadays, and analyses the current Chinese product liability system. Chapter Two and Three then deal respectively with the American and European product liability systems highlighting similarities as well as differences with respect to the Chinese product liability regime. Finally, Chapter Four offers a case study on how product liability rules are applied to cases involving defective medicinal products and medical devices in China, USA and Europe.

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Chapter 1

THE PRODUCT LIABILITY SYSTEM IN THE PEOPLE’S REPUBLIC OF CHINA

1.1 Introduction

In the last decade, the economic growth of the People’s Republic of China (PRC) has been underpinned by the increasingly important Chinese market of goods and services. The consumption of goods, accordingly, has progressively risen in China, and consumers have become more aware of their legal rights. High-profile cases, such as the 2008 melamine-tainted milk scandal, have decisively contributed to draw the attention on product safety concerns and, consequently, put pressure on authorities at the national and local level to enact legislation.\(^1\) In response, the Chinese Government has attached great importance to product quality and product liability. In 2009 Premier Wen Jiabao, indeed, announced the 'Year of Quality and Safety' of Chinese products on the 10\(^{th}\) National People's Congress; a proactive engagement in legislative and regulatory activities followed this announcement.\(^2\) This legislative activity primarily resulted in the

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promulgation of the Tort Liability Law in 2009 which largely completed the development of a modern product liability system in China.\textsuperscript{3}

More recently, president Xi Jinping has put emphasis on food safety and quality. In the words of the current president of the PRC: “Whether we can provide a satisfying solution on food safety to the people is an important test on our capacity of governance.”\textsuperscript{4} The subsequent enactment of the 2015 Food Safety Law constitutes evidence that food safety has been taken seriously.\textsuperscript{5}

Therefore, in recent years China is facing the challenge of dealing with product quality and safety effectively in order to pave the way for its future economic growth.

Foreign companies have come under scrutiny as well. In the past few years, in fact, China’s state media has fiery criticised western firms especially for unsafe food.\textsuperscript{6} In particular, on March 15\textsuperscript{th} (the World Consumer Rights Day) China’s national broadcaster CCTV hosts an annual program that accuses multinational companies of acting against the interests of consumers. In 2016 the show took aim at popular e-commerce platforms for food delivery and faked online sales.\textsuperscript{7} Thus, foreign companies have become increasingly sensitive to negative consumer perceptions in China.\textsuperscript{8}

This chapter aims primarily to trace the evolution of product liability law in China from the opening-up period to nowadays, and analyse the current Chinese product liability system. First of all, section two outlines the

\textsuperscript{3} Kristie Thomas,  \textit{The Product Liability System in China: Recent Changes and Prospects}. International and Comparative Law Quarterly /Volume 63/Issue 03(July 2014) (p.2).


\textsuperscript{6} Kazunori Takada, \textit{Foreign firms in China under growing media scrutiny}, http://www.reuters.com (September 6, 2011).

\textsuperscript{7} Adam Jourdan, \textit{China consumer day show targets fake online sales, food delivery}, http://www.cnbc.com (March 15, 2016).

\textsuperscript{8} Emily Feng, \textit{Ikea Extends Recall to China After Criticism}, http://www.nytimes.com (July 12, 2016).
development of product liability in China from the principles laid down in
the 1986 General Principles of Civil Law (GPCL) to the specific rules
provided for in the 1993 Consumer Rights and Interests Protection Law, the
1993 Product Quality Law and, finally, the 2009 Tort Liability Law.
Subsequently, section three offers an analysis of the Chinese product
liability system. Finally, section four deals with the recent trends in the
regulation of product liability in China, focusing mainly on the new Food
Safety Law entered into force on October 1, 2015.

1.2 Evolution of Product Liability in China

From the founding of the People’s Republic of China in 1949 to the early
1980s, the Chinese Communist Party renounced to all former laws on
ideological grounds, and no centralized provision on tort was enacted.\textsuperscript{9} The
absence of incentives to improve the quality and safety of products stemmed
from both the lack of competition between enterprises and the
incompatibility of the notion of an individual as a consumer with the
Communist ideology.\textsuperscript{10}
After Mao Zedong’s death, in 1978 Deng Xiaoping launched market-
oriented economic reforms, marking the start of the ‘reform and opening-
up’ era. China’s economy underwent an unprecedented transition from a
centrally planned to a socialist market economy, an economic structure
presenting the typical features both of market and planning economies.\textsuperscript{11}
The progressive accumulation of market elements, thus, catalysed
consumerism and brought about the need to protect the rights and interests

\textsuperscript{9} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects},
cit., p.4.
\textsuperscript{10} \textit{Ivi}, p.5.
of an emerging group of ‘consumers’. Deng Xiaoping’s economic reforms, in fact, had not only brought consumers back to the market place, but also market misconduct. Therefore, conflicts between consumers and unscrupulous producers were more likely to arise. However, neither relevant regulations were introduced, nor special courts were established to resolve consumer disputes since court action was not the preferred dispute resolution means in China. In response to the need for consumer protection, instead, local authorities established associations to safeguard citizens’ interests. The first consumer association was established by the Bureau of Trade and Commerce in Xinle County at Hebei Province in 1983, and the Xinle County model was emulated by many other local authorities. Finally, in 1984 the State Council authorised the establishment of the China Consumers’ Association (CCA), a consumer association at the national level. At that time, however, the institutional protection afforded by the CCA was not based on a statute.

Furthermore, from the early 1980s China acknowledged that the economic reforms needed to be underpinned by a robust legal system to foster foreign investors’ confidence in the Chinese market. Therefore, in 1982 a draft of the Civil Code was produced and in 1986 China promulgated the General Principles of Civil Law of the People's Republic of China. That basic law

13 Ip and Brenda Marshall, Evolution of Chinese consumer protection: through the lens of product quality laws, cit., p.4.
14 Ibid.
15 Ibid.
16 Ibid., p.5.
17 Ibid., p.6.
18 Zhonghua Renmin Gongheguo Minfa Tongze «中华人民共和国民法通则»
introduced the tort principles into the post-1949 Chinese legal system,\textsuperscript{19} since product liability was previously only based on contractual relationships between the seller and the injured party.\textsuperscript{20} Article 122 of the General Principles, dealing with liability for defective products, states that “if a substandard product causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability according to law. If the transporter or storekeeper is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.”\textsuperscript{21} This provision, thus, holds manufacturers and sellers liable for products that do not meet the quality standards adopted by the state or industry. However, Article 122 of the GPCL does not provide victims with a legal basis to seek remedies for losses caused by products that are not subject to such standards.\textsuperscript{22} Hence, this first attempt to introduce a tort liability regime was based on an insufficiently detailed provision which was not effective without the adoption of technical standards.\textsuperscript{23} In addition, individual consumers had minimal chances to launch a legal action against a negligent manufacturer, because “mechanisms provided for enforcing these product quality standards were limited to public enforcement through state agencies.”\textsuperscript{24}

Finally, in the first half of the 1990s, the need for binding legal measures to regulate the market induced the Chinese legislator to cope with conflicts between producers and consumers effectively. Thus, the issues of product

\textsuperscript{19} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., pp.5-6.
\textsuperscript{20} Junhong Hu, \textit{La nuova disciplina sulla responsabilità del produttore nella Chinese tort law}, cit., p.4.
\textsuperscript{21} General Principles of Civil Law, article 122 \texttt{http://www.npc.gov.cn/}
\textsuperscript{24} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., p.6.
liability and consumer protection have been specifically addressed with the enactment of the Consumer Rights and Interests Protection Law (CRIPL) and the Product Quality Law (PQL) in 1993. These statutes together set up a legal framework for the regulation of consumer protection and product quality. Nevertheless, the mechanisms to enforce the CRIPL and the PQL lacked effectiveness since these laws were still primarily enforced through governmental administrative agencies. The impact of the CRIPL and the PQL on the development of China’s product liability system is dealt with in paragraphs one and two of this section.

1.2.2 Consumer Rights and Interests Protection Law (1993)

The Consumer Rights and Interests Protection Law of the People’s Republic of China 1993 governs the sale of commodities and services; it aims to protect the rights of consumers and imposes obligations on producers and sellers with respect to the circulation of the product. The Law sets out the general principles of consumer protection in the Chinese legal system. The CRIPL 1993 has, indeed, turned the attention to the right of consumers to claim, rather than the liability attaching producers. Article 11 of the CRIPL, for example, states that “consumers suffering from personal injury or property damage resulting from their purchasing or using of commodities or receiving of services shall have the right to demand compensations in

26 Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa. Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa «中华人民共和国消费者权益保护法» 最新
28 Junhong Hu, La nuova disciplina sulla responsabilità del produttore nella Chinese tort law, cit., p.7.
29 Kristie Thomas, The Product Liability System in China: Recent Changes and Prospects, cit., pp.7-8. See also Junhong Hu, La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese, cit., p.45.
accordance with the law. Thus, the CRIPL marked a decisive change in the basis of the product liability system, starting to enhance the role of individual consumers as important players in the control of defective products.

Furthermore, Chapter VII entitled ‘Legal Responsibility’ provides for rules on the civil liability of ‘business operators’ and the compensation for the damage suffered by the consumer. In particular, according to article 40 of the CRIPL, business operators can be held liable in nine circumstances. These include, *inter alia*, ‘existing defects in the commodities’, ‘not conforming to the standards indicated on the commodities’ and ‘not conforming to the quality indicated by the product description’. The following articles 41, 42 and 44 deal respectively with personal injuries, death of consumers or other victims and damage to the properties of consumers.

In addition, another provision related to liability for defective products is article 35 of the CRIPL which states “*consumers or other victims* suffering personal injuries or property damage resulting from defects of commodities may demand compensations either from the sellers or from the manufacturers.” Thus, since ‘consumers and other victims’ are allowed to claim compensation from the manufacturer and the seller for the damage suffered, it is possible to conclude that the CRIPL provides for a strict

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32 The generic expression ‘business operators’ is used in the CRIPL; the terms ‘producer’ and ‘seller’ appear only once in the text of the Law. Junhong Hu, *La nuova disciplina sulla responsabilità del produttore nella Chinese tort law*, cit., p. 8.
34 Junhong Hu, *La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese*, cit., p. 59.
liability regime. Indeed, article 35 of the CRIPL does not require a contract or fault of the liable parties to establish liability for defective products.\textsuperscript{36} Therefore, the Consumer Rights and Interests Protection Law dealt with some issues that had already been addressed in the Product Quality Law which was enacted in the same year.\textsuperscript{37} The CRIPL has subsequently been amended in 2013. The amendment reinforced the provisions on the product recall mechanism under the Tort Liability Law 2009, and offered some clarification on the possibility of recovering punitive damages.\textsuperscript{38} The following paragraph will focus on the Product Quality Law 1993 and consider the socio-economic reasons that led to the adoption of the Amended Product Quality Law and other product safety regulations in the early 2000s.

1.2.1 Product Quality Law (1993) and product safety regulation

The Product Quality Law of the People’s Republic of China\textsuperscript{39} 1993 governs the quality control of commodities and services; it establishes a mechanism to ensure the production and circulation of safe products in China.\textsuperscript{40} Article 1 of the PQL, indeed, states that the main objects of the statute are “to strengthen the supervision and control of product quality, to establish the scope of liability for product quality, to safeguard the lawful rights and interests of consumers, and to protect the social and economic order.”\textsuperscript{41} The PQL, in fact, introduces minimum quality requirements and, for the first

\textsuperscript{36} Junhong Hu, \textit{La nuova disciplina sulla responsabilità del produttore nella Chinese tort law}, cit., p.8.
\textsuperscript{37} Ibid. The Product Quality Law passed on February 22, 1993, whereas the Consumer Rights and Interests Protection Law passed on October 31, 1993.
\textsuperscript{39} Zhonghua Renmin Gongheguo Chanpin Zhiliang Fa «中华人民共和国产品质量法»
\textsuperscript{41} Product Quality Law, article 1 \url{http://english.mofcom.gov.cn/}
time, specifies the obligations of producers and sellers towards consumers in supplying goods.\(^\text{42}\)

In addition, the PQL 1993 has explicitly recognised the civil liability of manufacturers for damages caused by defective products. Indeed, according to article 41 of the PQL, “if a producer's defective product causes physical injury to a person or damage to property other than the defective product itself, he shall be liable for compensation.”\(^\text{43}\) Thus, since the Product Quality Law contains provisions applicable to all products, it provides a comprehensive legal foundation for establishing liability for defective products in China.\(^\text{44}\)

Nevertheless, China’s exceptional economic growth brought about the emergence of new forms of unethical business practices that further undermined the efficacy of the Product Quality Law. In fact, lawmakers had to face the new issue of counterfeit and substandard products together with the enduring problem of poor quality goods.\(^\text{45}\) These issues appeared all the more pressing because the expansion of Chinese foreign trade resulted in counterfeit products being sold in overseas markets. The production of counterfeit goods, in effect, hurt the economic interests of China both because China incurred financial losses due to foreign bans on counterfeit goods, and because China’s negotiations for accession to the World Trade Organisation (‘WTO’) were potentially jeopardised. Indeed, to gain accession in the WTO, China had to show that Chinese products were


\(^{43}\) Product Quality Law, article 41 [http://english.mofcom.gov.cn/](http://english.mofcom.gov.cn/)


\(^{45}\) Ibid.
reliable for global consumers by enacting stringent laws to limit the production of poor quality goods.\textsuperscript{46}

For that reason, the Product Quality Law was amended in 2000. The amendment introduced the following changes. First, the enforcement regime was strengthened in order to limit corruption and counter local protectionism. Second, supervision of product quality was reinforced. Producers and sellers were required to implement a management system and carry out mandatory spot-checks on product quality. Third, sanctions were augmented, so that more of the parties involved in the course of a transaction may henceforth be held liable.\textsuperscript{47}

Therefore, overall, the Amended Product Quality Law appears to be consumer-friendly, but still Chinese legislators might not have in mind the interests of local consumers while drafting these amendments.\textsuperscript{48} This is evidenced by the fact that a number of long-standing issues were not addressed in the amended legislation. Among other things, it is worth mentioning that the Amended Product Quality Law provides limited protection for Chinese consumers against substandard imported goods. According to article 2, indeed, production and sales activities must occur within China in order to apply the Amended Product Quality Law; hence, the provisions of the PQL do not cover foreign manufacturers or exporters who have no physical presence in China.\textsuperscript{49}

\textsuperscript{46} \textit{Ivi}, p.10. See also Junhong Hu, \textit{La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese}, cit., p.75.
\textsuperscript{47} Mary Ip and Brenda Marshall, \textit{Evolution of Chinese consumer protection: through the lens of product quality laws}, cit., p.10.
\textsuperscript{48} \textit{Ivi}, pp.10-11. See also Junhong Hu, \textit{La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese}, cit., p.76.
\textsuperscript{49} Mary Ip and Brenda Marshall, \textit{Evolution of Chinese consumer protection: through the lens of product quality laws}, cit., p. 12.
However, a few years later, new laws and regulations were approved in order to extend the rights of individual citizens into new fields of liability. These statutes include the 2002 Production Safety Law, the 2002 Regulations on the Handling of Medical Accidents, the 2003 Road Traffic Safety Law and the 2006 Agricultural Product Quality Safety Law.

Insofar as food safety is concerned, the adoption of the Food Safety Law of the People’s Republic of China (“Food Safety Law”) in 2009 was mainly urged by the public outcry following food scandals in China. Among others, the 2008 Sanlu melamine-tainted milk scandal is certainly the most notorious. In this food safety incident ‘several infants died and tens of thousands of others were physically affected by the consumption of infant formula milk which had been adulterated with a chemical called melamine in order to mask the dilution of the milk’. The tainted-milk scandal, in fact, provided clear evidence of the failure of China’s piecemeal legal approach in relation to product quality.

Consequently, the Food Safety Law consolidated the various disparate regulations that governed China’s food industry. The Law, inter alia, established a Food Safety Commission in charge of the food safety matters nationwide, unified the food safety standards, increased liabilities for non-

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51 Zhonghua Renmin Gongheguo Shipin Anquan Fa «中华人民共和国食品安全法»
52 Junhong Hu, *La nuova disciplina sulla responsabilità del produttore nella Chinese tort law*, cit., p.35.
compliance, improved the existing food supervision mechanism and the food recall system. Nevertheless, the laws and regulations adopted at the beginning of the 2000s had not a significant impact on the product liability system in China, and important changes occurred only with the entry into force of the Tort Liability Law of the People’s Republic of China in 2010. The following paragraph focuses on the Tort Liability Law (TLL) and highlights how this statute has improved the system without altering the pre-existing roots of China’s product liability regime.

1.2.3 Tort Liability Law (2009)

The Tort Liability Law was enacted in 2009 after several years of debate that followed the release of its first draft in 2002. The international pressure arising from safety scandals, such as the 2008 Sanlu melamine-tainted milk scandal, likely hurried the passage of the Law. The Tort Liability Law creates a unified framework for tort law and provides a legal mechanism to govern liabilities and remedies. The Law, thus, does not abrogate tort-related provisions contained in other statutes,

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57 Zhonghua Renmin Gongheguo Qinquan Zeren Fa «中华人民共和国侵权责任法»
59 P. Neumann and C. Ding, China’s new Tort law: Dawn of the Product liability era, China Business Review (March-April 2010), p.29.
but consolidates the basic legal concepts into a single piece of legislation.\textsuperscript{61} Article 5 of the TLL, indeed, expressly clarifies that ‘where any other law provides otherwise for any tort liability in particular, such special provisions shall prevail.’\textsuperscript{62}

The Torts Law consists of twelve chapters, including both general provisions and special provisions. The latter provisions regulate seven special torts (\textit{teshu qinquan} 特殊侵权) or torts with particularities which include product liability,\textsuperscript{63} liability for motor vehicle traffic accident, liability for medical malpractice, liability for environmental pollution, liability for ultra-hazardous activity, liability for harm caused by domestic animals and liability for injury caused by an object.\textsuperscript{64}

The Law deals with product liability (\textit{chanpin zeren} 产品责任) only in Articles 41-47 contained in Chapter V. Many of its provisions governing product liability developed from the 1993 Product Quality Law and the 1986 General Principles of Civil Law.\textsuperscript{65}

\textsuperscript{61} P. Neumann and C. Ding, \textit{China's new Tort law: Dawn of the Product liability era}, cit., p.29. Junhong Hu, \textit{La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese}, cit., pp.81-82.

\textsuperscript{62} Tort Liability Law, article 5 \url{http://english.mofcom.gov.cn/}

\textsuperscript{63} The terminology of ‘Product Liability’ was officially used in Chinese law for the first time in the Tort Liability Law. Prior to the Torts Law, the concept of ‘Product Liability’ was usually intertwined with ‘Product Quality Liability’. ‘Product Quality Liability’ is a combination of civil, administrative and criminal liability imposed on a producer or seller/supplier who produces or sells products which do not meet the requirements of usage, safety and other standards prescribed by relevant regulations, quality standards or agreed upon in contracts. ‘Product Liability’ refers to a civil liability imposed upon the producer or seller/supplier of a defective product, if that defective product causes injury or property damage to the consumer. In a narrow sense, Product Liability only refers to tort. \textit{See} Arundel McDougall and Prashant Popat Q.C, \textit{International Product Law Manual 2011}, cit., p.633.


\textsuperscript{65} Ibid. \textit{See also} Junhong Hu, \textit{La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese}, cit., pp.80-81.
in fact, reproduce articles 41(paragraph 1)\textsuperscript{66}, 42 and 43 of the Product Quality Law.\textsuperscript{67} These articles establish a strict liability regime and provide that producers and sellers can be held jointly and severally liable for damages caused by a defective product. Whereas Article 44 of the TLL is closely related to article 122 of the General Principles Civil Law since it extends liability to third parties (e.g. carriers or warehousemen) who are responsible for the defect in the product.\textsuperscript{68}

As far as product liability is concerned, thus, the novelty of the Tort Liability Law lies in its provisions regarding preventive measures, warnings and recalls, and punitive damages (Articles 45, 46 and 47 of the TLL).\textsuperscript{69} Ultimately, therefore, the Tort Liability Law provides a wider protection against defective products, a prompt and just compensation for the injured party, and authorizes the victim to require the award of punitive damages.\textsuperscript{70} Accordingly, the Law reflects a clear trend towards higher levels of consumer protection.\textsuperscript{71}

Section three will analyse articles 41-47 of the TLL on product liability and other tort-related provisions of the PRC law which form China’s product liability system.

\textsuperscript{66} Article 41 paragraph 2 of the Product Quality Law, providing for circumstances excluding liability, is not reproduced in the Tort Liability Law. Junhong Hu, \textit{La nuova disciplina sulla responsabilità del produttore nella Chinese tort law}, cit., p.28.

\textsuperscript{67} Ibid.

\textsuperscript{68} Ibid.


\textsuperscript{70} P. Neumann and C. Ding, \textit{China’s new Tort law: Dawn of the Product liability era}, cit., p. 29.

1.3 The Product Liability System in China

The product liability system in China is essentially based on the Product Quality Law 1993, the Consumer Rights and Interests Protection Law 1993 and the Tort Liability Law 2009. Additional laws and regulations refer to specific sectors or industries. The provisions related to product liability apply where the product placed on the market exhibits a design or manufacturing defect and an injury to person or property has occurred because of the product defect.\(^72\)

This section offers a more detailed overview of the product liability regime in China. The first four paragraphs define where liability attaches to the manufacturer, the seller and third parties, where product liability is excluded, as well as on whom the burden of proof lies. The fifth paragraph considers the remedies available in case a defective product has been marketed, namely mandatory warnings and recalls. The sixth paragraph, then, addresses the preventive measures that the manufacturer must take, at the plaintiff’s request, in order to prevent the defective product from inflicting injury to the end-user. Finally, paragraphs seventh and eighth deal respectively with the recovery of compensatory and punitive damages, and the enforcement of the tort-related provisions governing product liability.

1.3.1 Non-fault or strict liability

As section two showed, the issue of liability for defective products was first addressed in the Product Quality Law (1993) and the Consumer Rights and Interests Protection Law (1993). Although these Laws introduced the same principles that were later included in the Tort Liability Law (2009), the analysis will mainly focus on the provisions set forth in Chapter V of the Torts Law.

Article 41 of the TLL, dealing with the manufacturer’s liability, states that “where a defective product causes any harm to another person, the manufacturer shall assume the tort liability.”\(^{73}\) Thus, if harm is caused to another person by a defect in the product, the manufacturer shall bear tort liability irrespective of how the defect arose. The victim is not required to prove the negligence or fault of the producer; thereby liability under article 41 of the TLL is strict.\(^{74}\) In addition, insofar as article 41 of the TLL refers to ‘another person’, the injured party could be anyone who suffers losses because of a defective product, and is not necessarily the consumer.\(^{75}\)

Nevertheless, the Torts Law does not provide a definition of the concepts of ‘defect’ (que xian 缺陷) and ‘product’ (chan pin 产品). With regard to the definition of the term ‘defect’, reference should be made to article 46 of the Product Quality Law,\(^{76}\) which states that “‘defect’ means one that constitutes an unreasonable threat to personal safety or to safety of another person’s property; where there are national or sectorial standards for ensuring human health, personal safety and safety of property to measure up to, ‘defect’ means failure to measure up to such standards.”\(^{77}\) Article 46 of the PQL, thus, provides two criteria for assessing whether a product is defective. First, a product is defective if it poses an unreasonable risk to the safety of the person and the person’s property;\(^{78}\) this case occurs where “the level of safety is less than a reasonable person in ordinary circumstances would expect from the product.”\(^{79}\) Second, a product is defective if it does

\(^{73}\)Tort Liability Law, article 41 [http://english.gov.cn/](http://english.gov.cn/)


\(^{76}\)Ibid.


\(^{79}\)Ibid.
not conform to the standards set by the state or a specific industry in order to ensure the safety of people and people’s property.\textsuperscript{80} The main issue with the definition of defect offered by article 46 of the PQL is the use of the term ‘\textit{unreasonable’}. It is, in fact, hard to see how this definition can be practically applied, since there is neither a clear indication of the level of danger that would be permissible in a product, nor a list of factors to take into account (for instance, the type of product; the intended use of the product; or any use of warnings).\textsuperscript{81} 

With respect to the concept of ‘product’, under article 2 paragraph 2 of the PQL, “product” means “one which is processed or manufactured for sale;”\textsuperscript{82} and article 2 paragraph 3 of the PQL adds “this law shall not apply to construction projects.”\textsuperscript{83} Therefore, the Product Quality Law provides a narrow definition of product, insofar as the product liability provisions do not apply to unprocessed goods, raw materials and construction projects.\textsuperscript{84} Finally, no legal definition of the term ‘manufacturer’ is provided; the predominant view among Chinese scholars is that the manufacturer for the purposes of the Product Quality Law is (i) the manufacturer of the finished product or its component part as well as raw material; (ii) the one who presents himself as a producer, by placing his name, trademark or other 

\textsuperscript{82} Product Quality Law, article 2 (2) \url{http://english.mofcom.gov.cn/} 
\textsuperscript{83} Product Quality Law, article 2 (3) \url{http://english.mofcom.gov.cn/} 
distinguishing feature on the product; or (iii) any person who imports into China a product for sale, hire, leasing or any other form of distribution.\textsuperscript{85}

\textbf{1.3.2 Exclusion from liability}

Although the manufacturer’s liability is strict, it is not absolute. The manufacturer does not, in fact, remain liable if it is able to make out a valid defence.\textsuperscript{86} Even if the Torts Law does not specify any exemption for the manufacturer, the defences provided for in the Product Quality Law remain applicable.\textsuperscript{87} According to article 41 paragraph 2 of the PQL, “a producer shall not be liable for compensation if he can prove the existence of any of the following circumstances:

1. The product has not been put in circulation;
2. The defect causing the damage does not exist at the time when the product is put in circulation; or
3. The science and technology at the time the product is put in circulation is at a level incapable of detecting the defect.”\textsuperscript{88}

With respect to PQL Article 41(2), it is important to point out that Article 46 of the PQL provides that a product is defective if it does not comply with national or trade standards; thus, the manufacturer’s ability to prove that the product conforms to such standards may also act as a potential


\textsuperscript{86} Mark Kendall and Jason McNerlin, \textit{Product Recall, Liability and Insurance: a global guide}, cit., p.120.


\textsuperscript{88} Product Quality Law, article 41(2) \url{http://english.mofcom.gov.cn/}
defence. However, this may just be taken as evidence that the product is not defective but does not constitute a conclusive proof.\(^9\)

To conclude, it is worth noting that PQL Article 41(3) introduces the so-called ‘development risk’ defence, which shields industries from liability for defective products “in cases where the risk was not discoverable in light of accessible scientific knowledge at the time the product was put onto the market.”\(^9\)

1.3.3 Extended liability

The Tort Liability Law widens the scope of liable parties. In addition to the manufacturer, in fact, liability is extended to the seller, the carrier, and the warehouseman.

The term ‘seller’ is not legally defined; however, wholesalers, intermediaries, retailers and importers are understood to be included in the terminology of sellers.\(^9\) Thus, any party in the chain of distribution could be held responsible for product defects.\(^9\) The Torts Law, indeed, aims to ensure that in each phases of the product manufacture and circulation, someone bears tort liability for damages caused by defective products.\(^9\)

The seller’s liability is provided in article 42 of the TLL,\(^9\) which states that “where physical injury is caused to a person or damage to another person’s property by a product’s defect resulting from the seller’s fault, the seller

\(^9\) Ibid.
should be liable for compensation.”

Hence, the seller becomes liable if the defect in the product occurs due to its fault and causes personal injuries or property damages. More specifically, fault on the part of the seller may be found in its actions or omissions. For example, the seller’s action may be the removal of a product label without authorization; whereas the seller’s omission may be a failure to use proper caution to safeguard the quality of the product. Furthermore, article 42 paragraph 2 of the TLL provides that “where the seller can identify neither the producer of the defective product nor the supplier thereof, he shall be liable for compensation.” Therefore, the liability becomes strict where the seller can specify neither the manufacturer nor the supplier of the defective product. The purpose of this provision is to avoid that the plaintiff’s claim becomes frustrated because of the unidentifiable manufacturer.

Article 44 of the Torts Law, moreover, provides that “where any harm is caused to others by a defective product and the defect is caused by the fault of a third party such as a transporter or a stock keeper, the manufacturer or seller of the product that has paid the compensation shall be entitled to be reimbursed by the third party.” After compensating the victim, thus, the

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95 Tort Liability Law, article 42 (1) [http://english.mofcom.gov.cn/](http://english.mofcom.gov.cn/) Italics mine.
96 Junhong Hu, *La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese*, cit., p.121.
98 Tort Liability Law, article 42 (2) [http://english.mofcom.gov.cn/](http://english.mofcom.gov.cn/).
manufacturer and the seller are entitled to be reimbursed by a third party if it is proven that the defect occurred due to its fault.\textsuperscript{102}

With respect to the assumption of liability resulting from a defective product, the main difference between the manufacturer, the seller and third party is the liability base.\textsuperscript{103} Indeed, non-fault liability is imposed on the manufacturer; whereas fault is required to impose liability on the seller and third parties. Consequently, the injured party has to prove that the defendant was at fault when making a claim against the seller or third parties.\textsuperscript{104}

Nevertheless, in spite of the differences in liability imputation, according to article 43 of the Torts Law the manufacturer and the seller are jointly and severally liable. The plaintiff is indeed allowed to sue the producer or the seller, or both of them for damages.\textsuperscript{105} The manufacturer or the seller are, then, entitled to seek indemnification from the other if they are at fault.\textsuperscript{106} In other words, if the product defect is caused by the producer, and the seller has paid compensation for the defect, the seller is entitled to be reimbursed by the producer. Likewise, if the defect in the product occurs due to the seller’s fault, and the manufacturer has paid compensation for the defect, the producer is entitled to be reimbursed by the seller.\textsuperscript{107}


\textsuperscript{103} \textit{i}vi, p. 483.

\textsuperscript{104} Ibid. The relation between the producer and the seller as construed by many Chinese legal scholars is discussed in Chapter 3, section 3.3.


Independently of how the injured party wants to proceed, therefore, the burden of proof does not vary depending on whether the plaintiff chooses to sue the manufacturer or the seller.\textsuperscript{108}

1.3.4 Burden of proof

As far as the burden of proof is concerned, Article 64 of the Civil Procedure Law\textsuperscript{109} generally applies to product liability cases. Thus, the claimant has to provide evidence of a defect in the product, an actual damage and the causation between the two.\textsuperscript{110} However, if the aggrieved party is unable to collect evidence for objective reasons, the People's Court should hear evidence \textit{ex officio}, at the request of any party involved.\textsuperscript{111} In principle, it is sufficient for the party to demonstrate coherently the facts that allow references about the defectiveness based on general experience; but “in many cases the People's Court has been satisfied when the aggrieved party suffered damage caused by the defective product”.\textsuperscript{112}

Therefore, once the claimant has provided evidence that the product is indeed defective, the burden of proof shifts on the defendant (i.e. the manufacturer or seller) who will then be responsible to prove a lack of

\textsuperscript{108} Junhong Hu, \textit{La sicurezza dei prodotti e la responsabilità del produttore nella legislazione europea e nella legislazione cinese}, cit., p. 122.

\textsuperscript{109} Article 64 of the Civil Procedure Law states “It is the duty of a party to an action to provide evidence in support of his allegations. If, for objective reasons, a party and his agent ad litem are unable to collect the evidence by themselves or if the people’s court considers the evidence necessary for the trial of the case, the people’s court shall investigate and collect it. The people’s court shall, in accordance with the procedure prescribed by the law, examine and verify evidence comprehensively and objectively.”


\textsuperscript{111} Binding and Claudius Eisenberg, \textit{Product Liability in the People’s Republic of China}, cit., p.32.

\textsuperscript{112} Ibid.
defectiveness or of causality, or any of the defences set out in article 41 paragraph 2 PQL.113

1.3.5 Available remedies: Mandatory Warnings and Recalls

This paragraph focuses on the remedies available to the manufacturer under article 46 of the Torts Law in situations where the product defects are detected only after the product has been marketed.

Article 46 of the TLL states that “where any defect of a product is found after the product is put into circulation, the manufacturer or seller shall take such remedial measures as warning and recall in a timely manner. The manufacturer or seller who fails to take remedial measures in a timely manner or take sufficient and effective measures and has caused any harm shall assume the tort liability.”114 Thus, where a product is found to be defective after having been placed into the stream of commerce, its manufacturer or seller must promptly take corrective measures. The first step in handling defective products is indeed warning (jing gao 警告), an after-sale notice serving two main purposes: first, it informs the consumer of the potential danger caused by the product; second, it provides the consumer with the necessary information to minimize the risk of injury when using the product.115

The second step in dealing with product defects is recall (zhao hui 召回), a process through which the defective product is returned at no cost to consumers. Recalls may be undertaken voluntary by the manufacturer, or in response to the order of the relevant administrative agency.116

114 Tort Liability Law, article 46 http://english.gov.cn/
116 Ivi, p.485.
The Tort Liability Law has, therefore, increased the civil remedies available to consumers by mandating a universal warning and product recall system. Before the Torts Law, indeed, warnings and recalls had been only required by sector-specific rules, such as the Food Safety Law and the administrative Measures on Defective auto Product Recalls.

In fact, since only administrative sanctions were previously imposed on offenders, the Torts Law first established the civil liability for failures to warn and/or recall. Accordingly, the manufacturer and the seller may be held liable if the victim can establish that the injury was caused by their failure to provide proper warning in advance. Thus, the Torts Law imposes liability on the manufacturer or the seller where he or she fails to take corrective measures in due course, or where the measures taken are insufficient to prevent damage.

1.3.6 Preventive Measures

Under the Tort Liability Law manufacturers and sellers may be required to take precautionary or preventive measures, in addition to warnings and recalls. Article 45 of the TLL states that “where the defect of a product endangers the personal or property safety of another person, the victim shall

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118 P. Neumann and C. Ding, *China’s new Tort law: Dawn of the Product liability era*, cit., p.29.
120 Mark Kendall and Jason McNerlin, *Product Recall, Liability and Insurance: a global guide*, cit., p.120.
121 Ivi, p.134.
be entitled to require the manufacturer or seller to assume the tort liabilities by removing the obstruction or eliminating the danger.”\textsuperscript{124} According to this provision, it is mandatory that the proper measures be implemented under plaintiff’s request when the defect exists in the product, but has not yet caused injury.\textsuperscript{125} Article 45 of the TLL potentially expands the mandatory product recall system to the situation where the claimant can only prove that the defective product endangers his personal or property safety.\textsuperscript{126} The existence of danger is, in fact, a prerequisite for claiming preventive measures in a product liability case.\textsuperscript{127}

1.3.7 Recoverable damages: compensatory damages and punitive damages

China’s product liability system allows the injured party to recover both compensatory and punitive damages. The Torts Law, indeed, introduced the possibility of recovering punitive damages, previously available only for certain product categories.\textsuperscript{128} This paragraph will first focus on the types of compensatory damages, and then examine the institution of ‘punitive damages’.

\textit{Compensatory damages}

As far as compensatory damages (\textit{buchangxing peichang} 补偿性赔偿) are concerned, articles 15 et seq. of the TLL define the scope of compensation

\textsuperscript{124} Tort Liability Law, article 45 \url{http://english.gov.cn} \textit{Italics mine.}
\textsuperscript{128} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., p.3. \textit{See also} P. Neumann and C. Ding, \textit{China’s new Tort law: Dawn of the Product liability era}, cit., p. 29.
for damages.\textsuperscript{129} According to these provisions, the injured parties are entitled to claim compensation for personal injuries, emotional injuries and property damage or other pecuniary loss. In case of personal injuries, compensation includes all expenses regarding medical treatment as well as loss of income due to absence from work (Article 16 of the TLL).\textsuperscript{130} In the event of death, the liable party must compensate the funeral costs and the death compensation (Article 18 of the TLL).\textsuperscript{131} Furthermore, article 22 of the TLL explicitly provides compensation for pain and suffering.\textsuperscript{132} Articles 19-21 of the TLL, finally, specifies compensation for damage to property.\textsuperscript{133} According to article 26 of the TLL, however, claims for compensation are proportionally reduced in case the aggrieved party’s negligence contributes to the damage.\textsuperscript{134}

\textsuperscript{129} Binding and Claudius Eisenberg, \textit{Product Liability in the People's Republic of China}, cit., p.29.
\textsuperscript{134} Ibid. \textit{See also} T.Wöffen, et al., \textit{Product Liability in the People’s Republic of China}, cit., p.16.
Punitive damages

In addition to compensatory damages, the injured party might claim punitive damages (*chengfaxing peichang* 惩罚性赔偿), also known as exemplary damages, a monetary compensation awarded in excess of compensation to the plaintiff to punish a defendant for a serious wrong.\(^{135}\) In fact, punitive damages are meant not to compensate the injured party, but to punish the offending party for its unconscionable conduct.\(^{136}\) In China punitive damages are not allowed as a general rule; they can, indeed, be awarded only exceptionally in product liability cases.\(^{137}\)

Punitive damages appeared, for the first time, in the Consumer Right and Interests Protection Law (1993). Under article 49 of the CRIPL, the court is allowed to award punitive damages equal to the price of the goods or service, in addition to compensatory damages, where the seller or service provider engaged in fraudulent conduct.\(^{138}\) In the version of the law amended in 2013, the punitive damages rise to three times of the price.

In the Food Safety Law (2009), the amount of punitive damages was raised to ten times of the price, where the manufacturer of food products does not conform to the food safety standard, or the distributors and retailers sell these food products with the knowledge of nonconformance.\(^{139}\)

The Torts Law has reinforced the legislative recognition of punitive damages and consolidated them in the tort system.\(^{140}\) Article 47 of the TLL provides that “where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a


\(^{136}\) [http://www.businessdictionary.com/definition/punitive-damages.html](http://www.businessdictionary.com/definition/punitive-damages.html)


\(^{138}\) Ibid.


death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.”

The Tort Liability Law, hence, affects the previous punitive damages scheme as follows.

On the one hand, it restricts the award of punitive damages to more limited circumstances where the injured party suffers either serious damage to health or death. Accordingly, in a situation where the injury caused by a defective product is not deemed serious, the victim may not be awarded exemplary damages.

On the other hand, it broadens the use of punitive damages to cover all kind of products besides foods, and it also entitles non-consumer victims to require exemplary damages. Furthermore, the court can order manufacturer and sellers to pay punitive damages only insofar as they clearly know the product defects, although no active fraud is involved.

The Torts Law, moreover, does not put a cap on punitive damages, unlike previous laws which restricted this compensation to a fixed multiple of the amount paid for the defective product. Under the Tort Liability Law, in effect, the assessment of punitive damages is entirely left to the discretion of the court.

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145 Ibid.
146 P. Neumann and C. Ding, *China’s new Tort law: Dawn of the Product liability era*, cit., p. 29.
Therefore, the main issue left unsolved in the Torts Law is how to calculate the amount of punitive damages to award.\textsuperscript{148} Article 47 of the TLL, indeed, does not set a monetary limit on the award of exemplary damages. In addition, it is unclear whether the calculation of punitive damages should be linked to the degree of the plaintiff’s injury or the magnitude of the defendant’s behaviour.\textsuperscript{149}

There are not yet, though, specific provisions for implementing article 47 of the TLL.\textsuperscript{150} Thus, since Chinese courts are reluctant to award exemplary damages unless provided for expressly in laws and regulations,\textsuperscript{151} “close attention should be paid to emerging case law and the latest amendments to relevant laws and regulations to see how these ambiguities are resolved.”\textsuperscript{152}

\textbf{1.3.8 Enforcement}

Product quality and safety regulations are still enforced primarily through administrative mechanisms, although individual consumers are now expressly empowered to launch civil actions against manufacturers of defective products.\textsuperscript{153} The main bodies which oversee product safety control and products recall are the General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ) and its local agencies.\textsuperscript{154} The AQSIQ is

\begin{itemize}
  \item \textsuperscript{148} Ibid.
  \item \textsuperscript{149} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., pp.21-22.
  \item \textsuperscript{151} Ibid.
  \item \textsuperscript{152} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., p.22.
  \item \textsuperscript{153} Ibid.
\end{itemize}
a ministerial level department reporting directly to the State Council.\textsuperscript{155} Another important agency involved in the product liability system is the State Administration of Industry and Commerce (SAIC), which is the principal administrative body responsible for protecting consumer rights.\textsuperscript{156} Other Chinese government authorities are empowered to ensure product safety and administer product recalls in their respective fields; these authorities include, for example, the Ministry of Agriculture, Ministry of Health, China Food and Drug Administration (CFDA).\textsuperscript{157}

\textbf{1.4 Recent trends in China’s product liability regulation}

Following the entry into force of the Tort Liability Law in 2010, China’s product liability system is largely completed.\textsuperscript{158} This Law, basically, by consolidating tort-related provisions into a single piece of legislation, is more accessible for individuals and, consequently, contributes to make consumers aware of their rights.\textsuperscript{159} Thus, the Torts Law provides clear evidence of the commitment of the Chinese government to take measures to enhance consumer rights.

After several high profile cases, in fact, product safety and in particular food safety has become a matter of great concern in China. The Chinese government, indeed, has been under great domestic and international pressure to beef up its supervision and regulation of product liability.\textsuperscript{160} The


\textsuperscript{157} Kristie Thomas, \textit{The Product Liability System in China: Recent Changes and Prospects}, cit., p.23.

\textsuperscript{158} \textit{Ivi}, p.33.

\textsuperscript{159} \textit{Ivi}, p.32.

promulgation of the Food Safety Law (2009) and the Tort Liability Law (2009) is believed to represent a first effort in this regard.\textsuperscript{161}

Subsequently, since 2013 the China Food and Drug Administration (CFDA) has played a leading role in revising China’s food safety regulatory regime.\textsuperscript{162} Besides, in December 2013 the Supreme People’s Court issued \textit{Provisions on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes}.\textsuperscript{163} More recently still, a signal that the Chinese government has taken food safety seriously has been the promulgation of the new Food Safety Law on October 1, 2015. Many of the media, indeed, look at the ‘2015 Food Safety Law’ as ‘the harshest food safety law in history’.\textsuperscript{164} The highlights of the new Food Safety Law are as follows.

\textit{Introduces harsh punishments for food safety-related violations.} The amendments, first of all, bring harsher civil, administrative and criminal penalties for offenders and their supervisors.\textsuperscript{165}

\textit{Strengthens the regulation of ‘special’ foods.} The 2015 Food Safety Law provides specific rules for ‘special’ foods including health foods, baby and toddler foods, and genetically modified organism (‘GMO’) foods.\textsuperscript{166}

\textit{Increases punitive damages for food safety violations.} Under the previous food safety law, a consumer may only claim an amount ten times the purchase price of the food product. Currently, “any consumer that is damaged by food not complying with food safety standards, may demand
reparation of three times the amount of any losses suffered from substandard food.”

New rules for online food retailers. Since retail transactions are increasingly conducted through e-commerce platforms, the 2015 Food Safety Law strengthens supervision on online food trading platforms. Under the revised law, online food retailers will be held liable if they are not able to provide the real name, address and contact information of a food distributor to consumers.

The 2015 Food Safety Law is, thus, “a landmark piece of food safety legislation in the PRC.” Nevertheless, the major challenge for China is now to effectively enforce the provisions of the 2015 Food Safety Law. To date, many in the global food markets are sceptical as to whether the provisions of the new Food Safety Law will have any meaningful impact. China’s food industry is, in fact, still dominated by a large number of small firms and this makes it difficult for the government to track. However, although practical results in the enforcement of the new Food Safety Law will be probably seen only in the long-term, the Chinese government continues to show its legislative effort to protect consumer rights. On July 2016, indeed, the China Food Drug Administration (CFDA) issued the Measures for the Investigation and Punishment of Illegal Acts

167 Laura Formichella, New Food Safety Law: building a modern food safety system in China, cit.
168 Ibid.
170 Huang Jianwen, Selected highlights of the amended PRC Food Safety Law, cit.
171 Sarah K. Rathke, Food supply chain issues in China (or, China’s new food safety act) (or, running the gauntlet in China), http://www.lexology.com (November 2, 2015).
172 Ibid. See also Celia Hatton, Will China’s new food safety rules work?, http://www.bbc.com/, (September 30, 2015).
concerning Online Food Safety that will be implemented from October 1, 2016. In conclusion, China has rapidly developed a regulatory framework for product liability in line with the international standards; however, it will have to be ascertained whether these provisions will be effectively enforced and the position of Chinese consumers will actually improve. 

173 The most significant section of the Measures will be the obligations of online food producers, traders and third-party online food trading platform providers. See Falk Lichtenstein, New Measures on PRC Online Food Sale, http://www.lexology.com/, (September 1, 2016).